

(1) 89-424
No.

Supreme Court, U.S.

FILED

SEP 9 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI,

Petitioner,

VS.

DENNIS BULLOCH,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

GEORGE R. WESTFALL
Missouri Bar Number 021067
Prosecuting Attorney
St. Louis County
7900 Carondelet
St. Louis, Missouri 63105
(314) 889-2600

and

JOHN M. MORRIS, III
Missouri Bar Number 25208
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Counsel of Record

THOMAS J. MEHAN
Missouri Bar Number 28958
Assistant Prosecuting Attorney
7900 Carondelet
St. Louis, Missouri 63105
(314) 889-2600
Counsel for Petitioner



QUESTIONS PRESENTED

1. Whether the Missouri Supreme Court erred again in interpreting the double jeopardy clause of the fifth amendment by holding that the State was precluded from trying a charge of Armed Criminal Action after trial of the underlying offense, when state statutes prohibited joint trial of those offenses?
2. Whether the authority of *Missouri v. Hunter*, 459 U. S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535, allowing for cumulative punishment for two offenses which are the "same" offense under *Blockburger v. U.S.*, extends to allowing successive prosecutions for those offenses, when state law prohibits trial of those offenses in one proceeding?

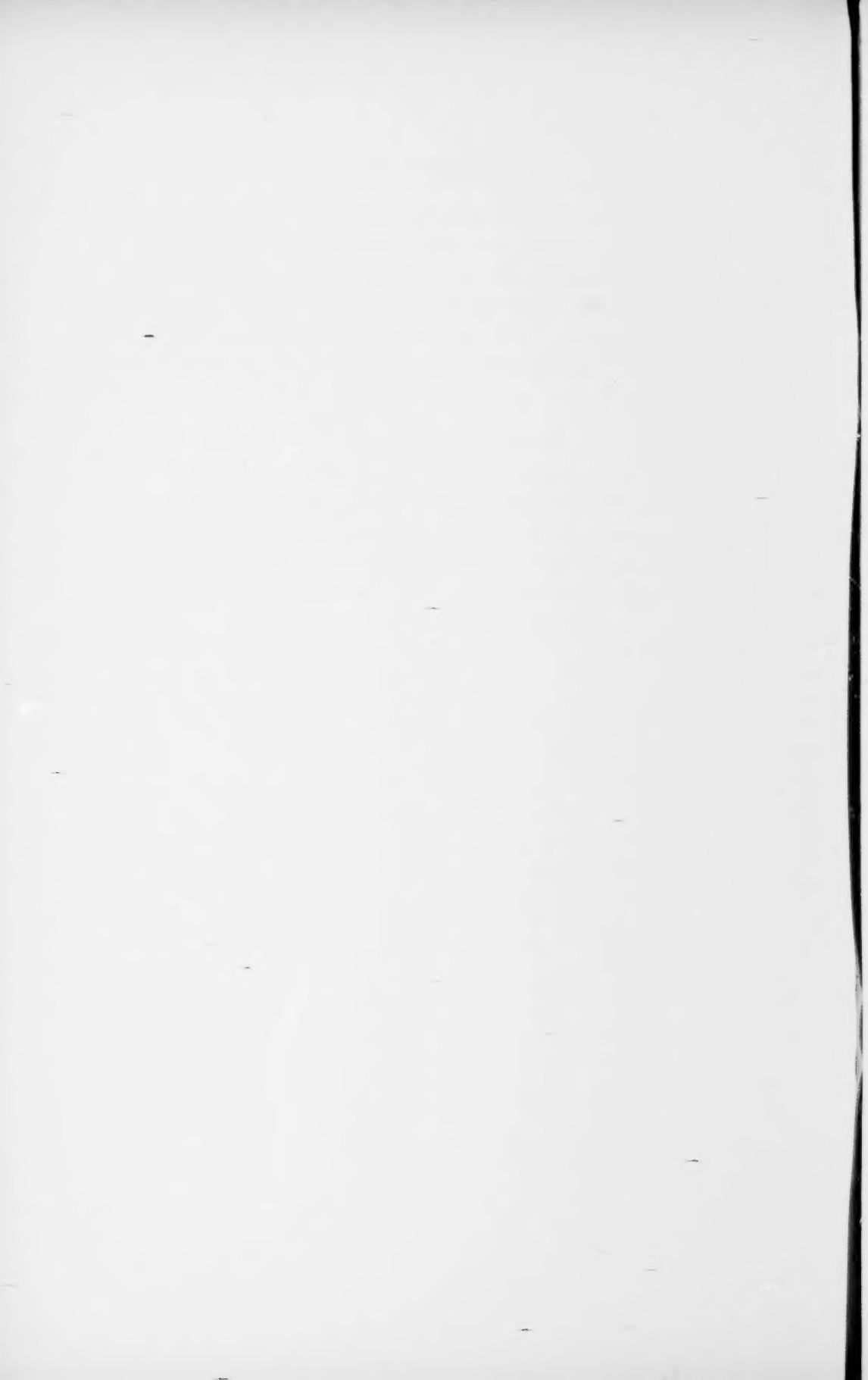


TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	2
Statement of the Case	5
Argument	8
Conclusion	14
Appendix A	A-1
Appendix B	A-15
Appendix C	A-29
Appendix D	A-35
Appendix E	A-36
Appendix F	A-40

TABLE OF AUTHORITIES

	Page
Cases:	
Albernaz v. United States, 450 U.S. 101 S.Ct. 1137, 67 L.Ed 2d 275 (1981)	8
Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed 2d 187 (1977)	10
Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed 2d 228 (1980)	10
Jeffers v. United States, 432 U.S. 137, 53 L.Ed 2d 168, 97 S.Ct. 2207 (1977)	11
Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed 2d 535 (1983)	6,9,10,13
Missouri v. Sours, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed 2d 820 (1980)	8,9
Missouri v. Sours, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed 2d 118 (1981)	8
North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969)	9
Price v. Georgia, 398 U.S. 323, 26 L.Ed 2d 300, 90 S.Ct. 1757 (1970)	11
Sours v. State, 593 S.W. 2d 208 (Mo. banc 1980)	8
Sours v. State, 603 S.W. 2d 592 (Mo. banc 1980) <i>(Sours II)</i>	8
State ex rel Bulloch v. Honorable A.J. Seier, Judge of the Circuit Court of Cape Girardeau County Missouri, 771 S.W. 2d 71 (Mo. banc 1989)	1,8,9,13

United States v. Dinetz, 424 U.S. 600, 47 L.Ed 2d 267, 96 S.Ct. 1075 (1976)	11
Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980)	8
Constitutional Provisions:	
U.S. Constitution, Amendment V	2
Statutes:	
Section 565.004 R.S.Mo. (1986)	2,10,11,12
Section 571.015 R.S.Mo. (1986).....	4,9
Section 565.020 R.S.Mo. (1986).....	4
Section 565.024 R.S.Mo. (1986).....	5



No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI,

Petitioner,

VS.

DENNIS BULLOCH,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

**PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT**

The State of Missouri, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Missouri Supreme Court entered on May 16, 1989 and as modified on June 13, 1989.

OPINION BELOW

The opinions of the Missouri Supreme Court *State ex rel. Dennis Bulloch v. Honorable A. J. Seier Judge of the Circuit Court of Cape Girardeau County*, 771 S.W.2d 71 (Mo. banc 1989) appears in the Appendix A and B hereto. The opinion of

the Missouri Court of Appeals Eastern District, Number 54859 August 9, 1988, is unpublished but appears in the Appendix F hereto.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on May 16, 1989. A timely motion for rehearing was filed. Appendix C. Said motion was denied on June 13, 1989 by the Missouri Supreme Court. Said denial appears in Appendix D hereto. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

Section 565.004 R.S.Mo. (1986) Joinder of offenses, exception-prior offenders, procedure, exception, first degree murder-joinder, first degree murder, waiver of death penalty.

1. Each homicide offense which is lawfully joined in the same indictment or information together with any homicide offense or other than a homicide shall be charged together with such offense in separate counts. A count

charging any offense of homicide may only be charged and tried together with one or more counts of any other homicide or offense other than a homicide when all such offenses arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3 and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree. In the event of a joinder of homicide offenses, all offenses charged which are supported by the evidence in the case, together with all proper lesser offenses under Section 565.025, shall, when requested by one of the parties or the court, be submitted to the jury or, in a jury-waived trial, considered by the judge.

2. A count charging any offense of homicide of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other homicide or offense other than a homicide committed against that individual. The State shall not be required to make an election as to the alternative count on which it will proceed. This subsection in no way limits the right to try in the conjunctive, where they are properly joined under subsection 1 of this section, either separate offenses other than murder in the first degree or separate offenses of murder in the first degree committed against different individuals.

3. When a defendant has been charged and proven before trial to be a prior offender pursuant to Chapter 558, RSMo, so that the judge shall assess punishment and not a jury for an offense other than murder in the first degree, that offense may be tried and submitted to the trier together with any murder in the first degree charged with which it is lawfully joined. In such case the judge will assess punishment on any offense joined with a murder in the first degree charge according to law and, when the trier

is a jury, it shall be instructed upon punishment on the charge of murder in the first degree in accordance with Section 565.030.

4. When the State waives the death penalty for a murder first degree offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

Section 571.015 R.S.Mo. (1986) Armed Criminal Action, defined, penalty.

1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the Department of Corrections and Human Resources for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

Section 565.020 R.S.Mo. (1986) First degree murder, penalty.

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Section 565.024 R.S.Mo. (1986) Involuntary manslaughter, penalty.

1. A person commits the crime of involuntary manslaughter if he:

(1) Recklessly causes the death of another person;
or

(2) While in an intoxicated condition operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause the death of any person.

2. Involuntary manslaughter is a class C felony.

STATEMENT OF THE CASE

The bound, gagged and nude body of Julia Bulloch was found in her burning garage on May 6, 1986. Her husband, Respondent was arrested in Santa Cruz, California on July 3, 1986.

On August 2, 1986 Respondent was indicted by the Grand Jury of St. Louis County for murder in the first degree. Respondent was also indicted in a separate file for arson second degree for the intentionally set fire in their home.

The State of Missouri proceeded to trial on only the murder first degree charge because it sought the death penalty. The jury returned a verdict of involuntary manslaughter and Bulloch was subsequently sentenced to a term of seven years in the Missouri Department of Corrections in accordance with the jury's recommendation.

After the homicide trial but prior to the trial on the arson charge the State of Missouri sought and received indictments for armed criminal action and tampering with physical evidence. The armed criminal action charge incorporates the involuntary manslaughter as the underlying felony. Appendix E.

Bulloch filed a Petition for Writ of Prohibiiton before the Missouri Court of Appeals, Eastern District. He sought prohibition from proceeding on both the armed criminal action charge and the tampering with physical evidence charge as being violative of the double jeopardy clause. The writ was issued only on the armed criminal action charge. No writ of prohibition was sought based upon a double jeopardy violation as successive prosecution concerning the arson second charge. Trial proceeded on the charges of arson second degree and tampering with physical evidence and resulting in convictions on both counts. Respondent was sentenced accordingly. The Missouri Court of Appeals - Eastern District made the preliminary writ permanent and the State of Missouri requested and was granted transfer to the Missouri Supreme Court on the issue of violation of the Double Jeopardy clause of the Fifth Amendment of the Constitution of the United States.

The Supreme Court of Missouri held that the provisions of *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed 2d 535, 103 S.Ct. 673 (1983) allows for cumulative punishment in a single proceeding and that unless the teachings of *Hunter* can be said to reach cases of successive prosecution the subsequent prosecution on the charge of armed criminal action would violate the protection against successive prosecution. The Supreme Court found that the armed criminal action count could have been joined and tried together with the murder first degree count.

The State of Missouri sought transfer to the Missouri Supreme Court for the reason that the statute addressing joinder of offenses in a murder first degree trial prohibit the joinder of any offense unless specifically enumerated circumstances exist. As the Honorable Kent Karohl pointed out in the opinion of the Eastern District "(t)here is some logic to the isolation of the murder first degree trial from the related armed criminal action charge where the death penalty is sought."

A motion for rehearing was filed before the Missouri Supreme Court pointing out that in their recitation of the statute they omitted a very essential word that fails their ruling that joinder is permissible.

On June 13, 1989 the Court ostensibly on their own motions modified the opinion, included the essential word alternative and then ignored its import in the statute.

Following the court's denial of the petition for rehearing in banc this petition for a writ of certiorari issues.

ARGUMENT

Judge Rendlen capsulized the history of the Fifth Amendment protection against double jeopardy and its interpretation and application by the Missouri Supreme Court in *State ex rel Bulloch v. Honorable A. J. Seier Judge of the Circuit Court of Cape Girardeau County Missouri*, 771 S.W.2d 71, 74 (Mo. banc 1989), when he stated '[n]otwithstanding ... directions from the United States Supreme Court, this Court refused to honor the 'rule of supremacy' and would not accept the Court's interpretation of the organic law embodied in the Constitution of the United States."

The Missouri Supreme Court had consistently held that notwithstanding the clear legislative intent to the contrary multiple convictions for both armed criminal action and the predicate felony violated the Fifth Amendment protection.

The Missouri Supreme Court exhibited its hostility to Armed Criminal Action prosecution by its history of misinterpreting the fifth amendment in invalidating armed criminal action convictions, beginning with *Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980). There they vacated the conviction of armed criminal action, and left only the robbery first conviction as violative of the double jeopardy clause. This Court granted certiorari and vacated the judgment and remanded the case for further consideration in light of *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed 2d 715 (1980). *Missouri v. Sours*, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed 2d 820 (1980).

The Missouri Supreme Court failed to follow the directive of *Whalen*, however, and again vacated the Armed Criminal Action conviction, in *Sours v. State*, 603 S.W.2d 592 (Mo. banc 1980) (*Sours II*). This Court did not review *Sours II* because he had been released from custody. *Missouri v. Sours*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed 2d 118 (1981). That lack of review, combined with the Missouri Supreme Court's disregard of *Whalen, supra*, and *Albernaz v. United States*, 450 U.S. 101

S.Ct. 1137, 67 L.Ed 2d 275 (1981), produced nothing short of chaos in Missouri Courts. Ultimately that chaos was settled by this Court's decision in *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed 2d 535 (1983). This petition asks this Court to review, yet again, the Missouri Supreme Court's interpretation of the fifth amendment's double jeopardy clause.

The double jeopardy clause of the fifth amendment guarantees to the defendant three protections: against reprocsecution after an acquittal; against a second prosecution after a conviction; and against unauthorized multiple punishment for the "same" offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969). The test for whether a multiple punishment is authorized is whether the legislature has evidence a clear intent to impose cumulative punishment. *Hunter, supra*. The Missouri offense of Armed Criminal Action is an example of such an authorization. Section 571.015 RSMo 1986.

The matter presented to this Court involves the interplay of the second and third protections: whether the protection against a second prosecution requires that cumulative punishment be only sought and obtained in a single trial.

Plainly cumulative punishment for both armed criminal action and the underlying felony, at bar involuntary manslaughter, does not violate the protection against cumulative punishment embodied in the double jeopardy clause. That issue was settled by this Court's opinion in *Hunter*, where the Court held that when a "legislature specifically authorizes cumulative punishments under two statutes, ... the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." 459 U.S. at 368-369.

The issue, one of first impression, is whether the authorized cumulative punishment must be obtained only in a single trial.

The Missouri Supreme Court held that it must, and that the authority of *Hunter* did not extend to successive prosecutions.

That Court's opinion however, practically begs this Court to review it. Its analysis of the successive prosecution question was virtually non-existent. The Court states that "unless the teachings of *Hunter* can be said to reach cases of successive prosecution, we must abide by the earlier decisions of the Supreme Court in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed 2d 228 (1980) and *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed 2d 187 (1977)" *Bulloch, supra* at 75.

The Court's reliance on *Vitale* and *Brown* is misplaced. Neither case contained the clear legislative intent as exhibited by the Missouri statute at bar. Section 565.004 RSMO 1986. Specifically the Missouri legislature, by adding paragraph 4 to the statute intended to provide for successive prosecution to obtain cumulative punishment when the State seeks the death penalty. The legislature of Illinois and Ohio did not authorize cumulative punishments concerning the charges in their respective cases. There is no indication from this Court's opinions that the Ohio legislature authorized cumulative punishments for the offenses of joyriding and the offense of stealing an automobile. Nor Illinois concerning failure to reduce speed and involuntary manslaughter.

This Court has previously recognized exceptions to the prohibition against successive prosecutions. The cases that bar successive prosecution are without that which has clearly been provided by the Missouri legislature and that is its clear intent to authorize cumulative punishments, *Hunter*, and successive prosecution. Section 565.004 RSMO 1986. Generally, when the second prosecution arises through no fault of the State, there is no prohibition against the second prosecution. The general rule is applied in several specific examples.

"One commonly recognized exception is when all the events necessary to the greater crime have not taken place at the time

the prosecution for the less is begun.” *Jeffers v. United States*, 432 U.S. 137, 53 L.Ed 2d 168, 97 S.Ct. 2207 (1977).

Continuing jeopardy applies after a successful appeal by defendant and there is no bar to a second trial. *Price v. Georgia*, 398 U.S. 323, 26 L.Ed 2d 300, 90 S.Ct. 1757 (1970).

Continuing jeopardy also applies after a defendant requests and is granted a mistrial *United States v. Dinetz*, 424 U.S. 600, 47 L.Ed 2d 267, 96 S.Ct. 1075 (1976).

Most importantly, due to the similarity with this case is the situation presented in *Jeffers v. United States*, 432 U.S. 137, 53 L.Ed 2d 168, 97 S.Ct. 2207 (1977), where the Government sought consolidation of separate charges in one proceeding. The defendant successfully opposed the consolidation, then objection to the second trial. By opposing the consolidation, *Jeffers* was solely responsible for the successive prosecution. The double jeopardy clause therefore presented no bar to that prosecution, because it was occasioned through no fault of the government.

Presently, the successive prosecution is a result of the requirements of the Missouri statute governing joinder of offenses in a Murder First Degree charge. At the time of Bulloch’s trial for capital murder, Missouri law prohibited joinder at trial of any offense for which the jury would consider punishment at the same time it considered the death penalty. The statute only allows joinder of other offenses with the murder first in limited situations.

According to Section 565.004.1 R.S.MO. 1986 offenses may be joined and tried together when the offenses arise out of the same transaction or constitute part of a common scheme or plan. The statute further states the offense may not be tried together unless authorized by sub-paragraphs two, three or four.

Section 565.004.2 provides for joinder of the homicide offense with the offense other than a homicide only when charged "ALTERNATIVELY". Further this section states that the State shall not be required to make an election as to the alternative count.

Obviously armed criminal action could not be charged as an alternative count to the murder first degree. Therefore this subsection does not apply. Section 565.004.3 provides for joinder when the defendant has been proven to be a prior offender so that the judge and not the jury should assess punishment on the non-homicide offense. In this situation the jury shall still be instructed on the possible punishments for the murder first. In the case at bar the Respondent was not a prior offender, and punishment would be assessed by the jury on all counts. Therefore, this subsection did not apply.

The last section, 565.004.4 allows for joinder when the State waives the death penalty, thusly leaving only one possible punishment, life without parole. Here, the State sought the death penalty, precluding the operation of this subsection. Section 565.004, taken as a whole, therefore precludes joinder of any companion charge in the trial of Respondent for murder first degree.

Because the statute governing joinder precluded the State from proceeding on the Armed Criminal Action charge at the same time as the murder first degree, the failure to proceed jointly cannot be attributed to the fault of the State. Indeed, both Courts below seemed to conclude as much.

Judge Karohl of the Missouri Court of Appeals incorrectly concluded that the joinder statute required the State to make an election as to which punishment it desired, because the counts against Bulloch could not lawfully be tried together. The opinion of the Eastern District correctly states that there "is some logic to the isolation of the murder first degree trial from the related armed criminal action charge when the death sentence is at issue". Appendix F p. 43.

Judge Rendlen stated that the Missouri Supreme Court was “[f]ully aware that in all likelihood Relator would not have wanted the armed criminal charge tried with the first degree murder offense had the indictments been returned contemporaneously. [n]onetheless [the Court] conclude[d] that Relator’s protection against successive prosecution for the same offense would be violated... *Bullock* at 75.

The Missouri Supreme Court however, refused to follow the spirit of *Hunter*, by prohibiting the successive prosecution to obtain authorized cumulative punishment. This Court found a clear legislative intent to allow cumulative punishment in *Hunter*. The Missouri courts found a legislative intent to prohibit joint trial of both charges. This case presents a clear opportunity to emphasize and extend the teachings of *Missouri v. Hunter* to its next logical step. The logical extention of *Hunter's* deference to the clear legislative intent should go beyond that of cumulative punishment and should issue its writ of certiorari and review and reverse the Court below. In the alternative remand this matter for clarification by the Missouri Supreme Court of the interpretation of the joinder statute.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Missouri Supreme Court's judgment be reversed, or in the alternative, vacated and remanded for clarification.

Respectfully submitted,

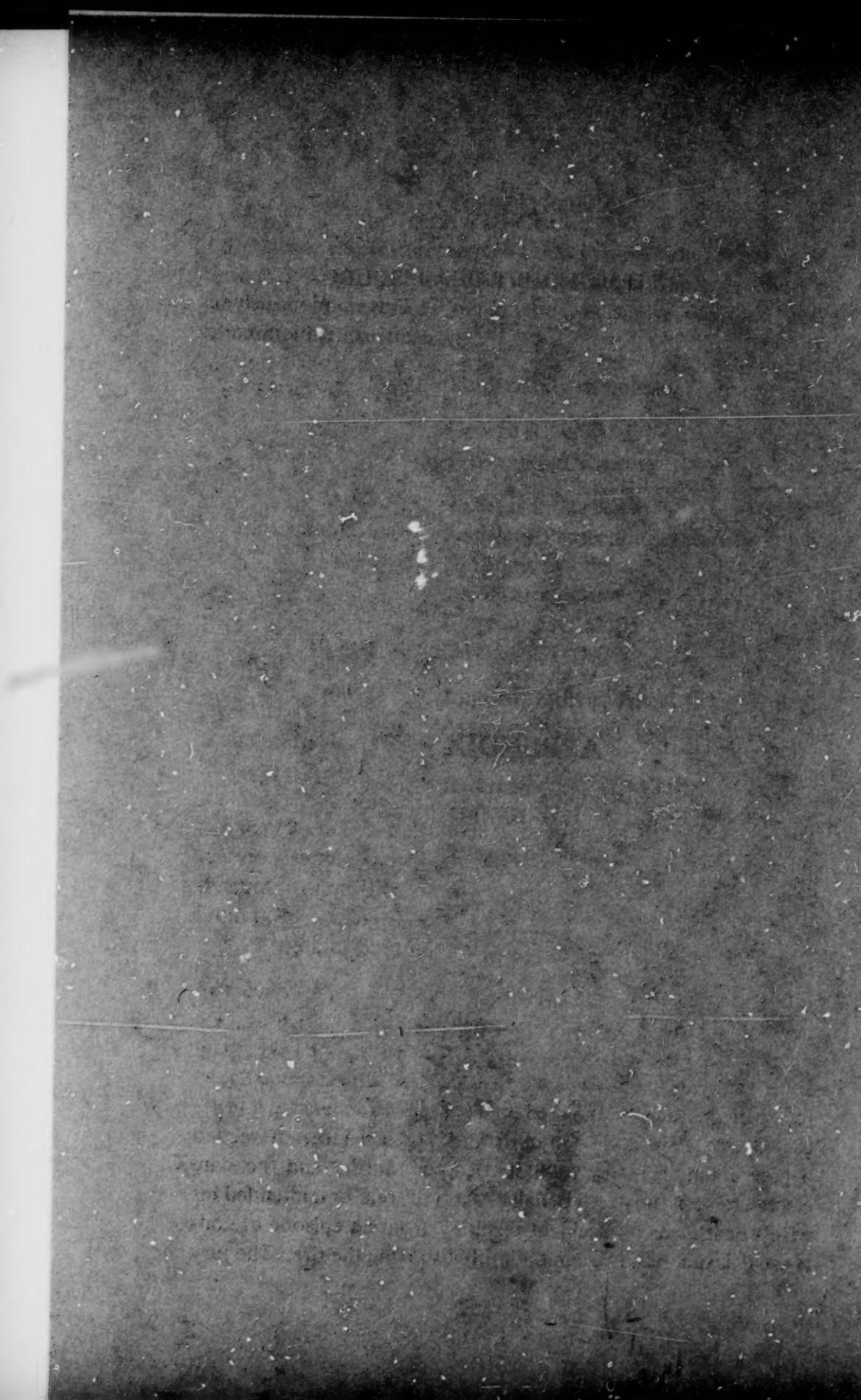
George R. Westfall
Prosecuting Attorney

Thomas J. Mehan
Assistant Prosecuting Attorney
St. Louis County
7900 Carondelet
Clayton, MO 63105
(314) 889-2600

John M. Morris, III
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Counsel of Record

APPENDIX



APPENDIX A

SUPREME COURT OF MISSOURI

en banc

No. 71012

This opinion includes
a modification made
on the courts own
motion on 6/13/89

**State ex rel. DENNIS BULLOCH,
Relator,**

vs.

**HONORABLE A.J. SEIER, Judge of the Circuit Court
of Cape Girardeau County, Missouri,
Respondent.**

PROCEEDING IN PROHIBITION

(Duplicate of Filing on May 16, 1989)

Relator instituted this proceeding to prohibit respondent from allowing the state to prosecute relator for armed criminal action in connection with the death of his wife, Julia Bulloch. The Court of Appeals, issuing the requested writ, concluded prosecution for armed criminal action violated relator's protection under the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States. We granted transfer and now make the preliminary rule absolute.

On May 6, 1986, relator's wife was asphyxiated when two strips of cloth were placed in her mouth and retained by tape wrapped around her face and over her mouth. The victim died at the family home, in which a fire occurred almost immediately following her death. Indicted on a charge of first degree murder in August, 1986 and, a month later, on a charge of second degree arson, relator was first tried for murder and the state elected to seek the death penalty. At trial, relator contended his wife's death was an accident resulting from an episode of consensual sexual bondage, but admitted starting the fire. The jury

found relator not guilty of first or second degree murder and returned a verdict of guilty on the lesser offense of involuntary manslaughter. Relator was sentenced to a term of seven years' imprisonment.

Following the homicide trial, relator was indicted on additional charges of armed criminal action and tampering with physical evidence. The armed criminal action indictment charged that relator recklessly caused the death of Julia Bulloch by asphyxiation and committed the felony of involuntary manslaughter "by, with, or through the use, assistance or aid of a dangerous instrument."¹ In response to a motion to dismiss that indictment, the state contended the tape and gag constituted a "dangerous instrument." Respondent overruled relator's motion to dismiss, which was based upon claims of double jeopardy, collateral estoppel, absence of legislative intent, and denial of due process in the form of prosecutorial vindictiveness. The Court of Appeals, Eastern District, concluded the question of prosecutorial vindictiveness involved disputed facts and was a matter for the trial court's discretion to be considered, if necessary, on direct appeal; however, the court found that the armed criminal action proceeding constituted double jeopardy and issued its writ of prohibition. During pendency of the proceedings in prohibition, relator was tried and convicted of arson and the tampering with physical evidence charge which had been added after the homicide trial, and he was sentenced to six and five years' imprisonment, respectively.

The circumstances here present questions under the Double Jeopardy Clause, which has been said to protect against a se-

¹ The state does not contend that additional facts necessary to sustain the armed criminal action charge had not occurred or were not discovered despite the exercise of due diligence at the time of the murder trial. Indeed, it appears that the state was fully aware of the facts alleged in the armed criminal action indictment when it proceeded to prosecute relator for first degree murder.

cond prosecution for the same offense after acquittal or conviction and preclude imposition of multiple punishments for the same offense. *Brown v. Ohio*, 97 S. Ct. 2221, 2225 (1977).² The concept of what constitutes the "same offense" in the context of double jeopardy was discussed in *Blockburger v. United States*, 52 S. Ct. 180 (1932), wherein it was stated: "The test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of a fact which the other does not.*" *Id.* at 182. Recent United States Supreme Court jurisprudence, however, has limited application of the *Blockburger* test in cases involving a single trial. See, e.g., *Missouri v. Hunter*, 103 S. Ct. 673 (1983); *Albernaz v. United States*, 101 S. Ct. 1137 (1981); *Whalen v. United States*, 100 S. Ct. 1432 (1980). In *Missouri v. Hunter*, it was noted: "the *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose *the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.*" *Id.* at 679 (quoting *Albernaz*, 101 S. Ct. 1137, 1143 (1981) (emphasis in original)). In *Hunter* the United States Supreme Court rejected this Court's erroneous notion that prosecution of a defendant for both first degree robbery and armed criminal action was violative of the Double Jeopardy Clause. The Court held "the question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. . . ." 103 S. Ct. at 679. Because the Missouri legislature clearly intended cumulative punishment under the armed criminal action statute, the Court found defendant was not subjected to double jeopardy.

² The double jeopardy clause of the Missouri Constitution, art. I, § 19, has been construed to apply "only where there has been an acquittal of the defendant by a jury." *Murray v. State*, 475 S.W.2d 67, 70 (Mo. 1972).

The core issue of double jeopardy for convictions of robbery in the first degree as well as armed criminal action was decided by this Court in 1977 in *State v. Treadway*, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied*, 439 U.S. 838, 99 S. Ct. 124, 58 L.Ed.2d 135 (1978). In that case, we properly took the position that multiple convictions for both armed criminal action and the underlying felony were not violative of the Double Jeopardy Clause of the United States Constitution. Two years later, the Court took the same position in *State v. Valentine*, 584 S.W.2d 92 (Mo. banc 1979), but six months thereafter on January 15, 1980, this Court handed down the first of its aberrant decisions in *Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980) [*Sours I*], in which it vacated a conviction of armed criminal action that had been entered with a robbery first degree conviction.³ The United States Supreme Court vacated and remanded *Sours I* for reconsideration in light of *Whalen v. United States*, 100 S. Ct. 1432 (1980), which gave adequate guidance for this Court to uphold the armed criminal action conviction in *Sours*. Nevertheless, this Court in *Sours v. State*, 603 S.W.2d 592 (Mo. banc 1980) [*Sours II*] intransigently refused to follow the teachings of *Whalen* and vacated *Sours*'s armed criminal action conviction once more. Certiorari was again sought in the United States Supreme Court, but prior to a hearing there *Sours* was released from confinement and certiorari was denied. Noteworthy is the fact that Justice Blackmun and Justice Rehnquist, advised of *Sours*'s release, would have dismissed the petition as moot. *Missouri v. Sours*, 101 S. Ct. 953 (1981). In March of 1981, in *Albernaz v. United States*, 101 S. Ct. 1137 (1981), the Supreme Court forcefully reiterated its position, squarely contrary to that of this Court in *Sours I* and *Sours II*. At that point, the United States Supreme Court, acutely aware of the problems flowing from *Sours I* and *II*, noted that the various districts of the

³ In neither *Sours I* nor its progeny did this Court make clear how half of a judgment (i.e. armed criminal action) was invalid but the other half (robbery) was perfectly valid.

Missouri Courts of Appeals, assuming they were bound by this Court's *Sours* decisions, had in a growing number of cases felt required to reverse armed criminal action convictions. Between March 23 and June 22, 1981, the United States Supreme Court vacated judgments of reversal in sixteen such cases and in each instance remanded the cause for further consideration in light of *Albernaz*. In addition, at the time of this Court's decision in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), where this Court obdurately refused to follow *Albernaz*, the Supreme Court accepted review of three of our cases including State v. Williams, 606 S.W.2d 777 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. Greer, 605 S.W.2d 93 (Mo. 1980). See Missouri v. Greer, 101 S. Ct. 3000 (1981). In *Albernaz*, the Court affirmed the opinion of the United States Court of Appeals for the Fifth Circuit upholding petitioner's conviction and sentences and denying his claim of double jeopardy. The Court, by way of introduction to its incisive, pellucid opinion, noted that:

We granted certiorari to consider whether Congress intended consecutive sentences be imposed for the violation of these two conspiracy statutes and, if so, whether such cumulative punishment violates the Double Jeopardy Clause of the United States Constitution.

101 S. Ct. at 1140. By its decision the Court, in its concluding paragraphs, removed any question as to its views on the matter, stating:

Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.

101 S. Ct. at 1145.

Immediately after this pronouncement, the Court commenced a succession of orders to Missouri's appellate courts vacating judgments which had reversed armed criminal action convictions when accompanied with convictions of other crimes and mandating further consideration in the light of *Albernaz*.

Notwithstanding these directions from the United States Supreme Court, this Court refused to honor the "rule of supremacy" and would not accept the Court's interpretation of the organic law embodied in the Constitution of the United States. By refusing so to do, the majority sought to burden the Missouri Legislature with its view of so-called federal constitutional restraints contrary to those enunciated by the United States Supreme Court under the federal Constitution. In *Oregon v. Hass*, 95 S. Ct. 1215, 1219 (1975), the Court wrote "a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original.) The Oregon Court's restrictive misinterpretation of the 14th Amendment in that case was cast aside as error. Despite these developments, detailed in the dissent of this writer in *State v. Haggard*, 619 S.W.2d 44, 51-57 (Mo. banc 1981) (responding to the opinion of Welliver, J., on the motion for rehearing), it was pointed out this Court refused to abide directives of the Supreme Court of the United States and was willing to burden our legislature with federal constitutional notions contrary to the Court's mandate. As related in that dissent, "Neither the Oregon court in *Hass* nor the North Carolina court in *North Carolina v. Butler*, [99 S. Ct. 1755 (1979)] were permitted to journey such an imperious path of nonconformance." 619 S.W.2d at 57.

But that was merely the tip of the iceberg. Immediately upon the heels of *Haggard*, the same mistaken notion was pressed upon the following cases in quick order by this Court and led to wholesale reversal of armed criminal action convictions in: *State v. Fletcher*, 619 S.W.2d 57 (Mo. banc 1981); *State v. Greer*, 619 S.W.2d 62 (Mo. banc 1981); *State v. Williams*, 619 S.W.2d 63

(Mo. banc 1981); State v. Hawkins, 619 S.W.2d 64 (Mo. banc 1981); State v. Greer, 619 S.W.2d 65 (Mo. banc 1981); State v. Collins, 619 S.W.2d 66 (Mo. banc 1981); Brown v. State, 619 S.W.2d 68 (Mo. banc 1981); State v. Helton, 619 S.W.2d 69 (Mo. banc 1981); State v. McGee, 619 S.W.2d 70 (Mo. banc 1981); State v. Tunstall, 619 S.W.2d 71 (Mo. banc 1981); State v. Counselman, 619 S.W.2d 72 (Mo. banc 1981); State v. Sinclair, 619 S.W.2d 73 (Mo. banc 1981); State v. Payne, 619 S.W.2d 75 (Mo. banc 1981); State v. Crews, 619 S.W.2d 76 (Mo. banc 1981); State v. Lowery, 619 S.W.2d 77 (Mo. banc 1981); State v. Crews, 619 S.W.2d 78 (Mo. banc 1981); State v. White, 619 S.W.2d 79 (Mo. banc 1981); State v. Martin, 619 S.W.2d 80 (Mo. banc 1981); and State v. Williams, 619 S.W.2d 82 (Mo. banc 1981). During this period and in the weeks that followed until *Hunter* was specifically directed to the Missouri courts, enumerable writs of habeas corpus and direct orders were mistakenly issued by this Court vacating an array of felony convictions, producing a chaotic situation in Missouri.

On November 10, 1981, this Court denied review of the decision of the Western District of the Court of Appeals in State v. Hunter, 622 S.W.2d 374 (Mo. App. 1981), which had vacated the defendant's armed criminal action conviction on double jeopardy grounds, leaving only his robbery conviction. Reaching directly to the Court of Appeals by writ of certiorari, the Court vacated the decision of the Missouri Court of Appeals and remanded with the ringing mandate for reinstatement of the armed criminal action conviction. In that opinion, delivered by Chief Justice Burger, the Supreme Court reviewed the strange history of this Court's failure to follow *Whalen* and *Albernaz* and pointed out that the decisions in *Sours I*, *Sours II*, and *Haggard* expressed a view which "manifests a misreading of our cases on the meaning of the double jeopardy clause of the Fifth Amendment." 103 S.Ct. at 677. The Court, brushing aside the *Blockburger* argument, pointed out that:

[h]ere, the Missouri Legislature has made its intent crystal clear. legislatures, not courts, prescribe the scope of punishments.

Where as here, a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes prescribe the “same” conduct under *Blockburger*, a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishments under such a statute in a single trial.

Id. at 679 (footnote omitted).

Hunter, of course, involved a single trial. Had the charges in the case at bar been tried in one proceeding, there could be no question relator’s claim of double jeopardy would fail. However, because the charge of armed criminal action was not tried with the underlying felony, the Double Jeopardy Clause prohibition against successive prosecution must be considered and we must determine whether *Hunter* controls this case. Our task in this regard is somewhat complicated by § 565.004, RSMo 1986, pertaining to joinder of offenses in a trial for first degree murder.⁴ As evident from the plain language of the statute, circumstances allowing joinder of offenses with first degree

⁴ Section 565.004, RSMo, provides in pertinent part:

1. Each homicide offense which is lawfully joined in the same indictment or information together with any homicide offense or offense other than a homicide shall be charged together with such offense in separate counts. A count charging *any* offense of homicide *may only* be charged and tried together with one or more counts of *any other homicide or offense other than homicide when all* such offenses arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3, and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree. . . .

murder are limited; but where, as here, the charges arose from the same transaction and relate to acts committed against the same victim, the murder and armed criminal action counts could have been joined and tried together. § 565.004.2, RSMo 1986.

Fully aware that in all likelihood relator would not have wanted the armed criminal action charge tried with the first degree murder offense had the indictments been returned contemporaneously, we must nonetheless conclude that relator's protection against successive prosecution for the same offense would be violated if the current prosecution for armed criminal action were allowed. Section 571.015, RSMo 1986, defines armed criminal action thusly:

1. [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is *also* guilty of the crime of armed criminal action. . . .

Armed criminal action, by definition, incorporates all the elements of the underlying felony. Here the armed criminal action indictment contains an allegation relator committed the felony of involuntary manslaughter, and it cannot be said that in this instance proof of involuntary manslaughter requires proof

-
2. A count charging *any* offense of *homicide of a particular individual* may be joined in an indictment or information and tried with one or more counts charging alternatively *any other homicide or offense other than a homicide* committed *against that individual*.

. . . .

4. When the state waives the death penalty for a murder first degree offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

(Emphasis added.)

of an additional fact which the armed criminal action charge does not. The state unquestionably relies on and will attempt to prove the elements of involuntary manslaughter in establishing relator's commission of armed criminal action. The two offenses are therefore the same for purposes of relator's claim of successive prosecution, and unless the teachings of *Hunter* can be said to reach cases of successive prosecution, we must abide the earlier decisions of the United States Supreme Court in *Illinoian v. Vitale*, 100 S. Ct. 2260, 2267 (1980); and *Brown v. Ohio*, 97 S. Ct. 2221, 2226-7 (1977). Although we embrace the philosophy reflected in *Hunter*, the Court's strong emphasis on the fact that case involved a single proceeding leads us to reluctantly conclude *Hunter* does not control in this instance, where there is an attempt at successive prosecution.

For the reasons stated in this opinion, the rule in prohibition is made absolute. Having so held, we need not reach the other questions raised by the parties.

ALBERT L. RENDLEN, Judge

Billings, C.J., concurs; Robertson
and Covington, JJ., concur in result;
Blackmar, J., concurs in result in
separate opinion filed; Welliver, J.,
concurs in result and concurs in
concurring in result opinion of
Blackmar, J.; Higgins, J., concurs
in separate opinion filed.

SUPREME COURT OF MISSOURI

en banc

No. 71012

STATE ex rel. DENNIS BULLOCH,
Relator,

vs.

HONORABLE A. J. SEIER, Judge of the Circuit Court
of Cape Girardeau County, Missouri,
Respondent.

OPINION CONCURRING IN RESULT

(Duplicate of Filing on May 16, 1989)

I.

The rambling narration of the history of the construction of § 571.015, RSMo 1986, is quite beside the point. The discussion should start, rather than ending, with *Missouri v. Hunter*, 459 U.S. 359 (1983), which held that, in a single trial, cumulative punishments could be assessed for a felony (such as armed robbery) and for armed criminal action for the use of a dangerous instrument or deadly weapon in the perpetration of that felony. By this analysis, the underlying felony is in effect a lesser offense included within the charge of armed criminal action. I rather agree that *Illinois v. Vitale*, 447 U.S. 410 (1980) and *Brown v. Ohio*, 431 U.S. 161 (1977) preclude the separate trial of the greater offense, after the lesser has been separately tried, regardless of the result of the initial trial.

I accept the statement in the principal opinion that § 565.004.2, RSMo 1986, authorizes the trial of a homicide offense, including murder in the first degree, with a nonhomicide offense such as armed criminal action. In any event the charges could have been brought in the same indictment or information,

Rule 23.05, and tried jointly pursuant to Rule 24.07. Inasmuch as the counts could have been tried together, the state should not now be allowed to try the armed criminal action separately.

For another reason I believe that the writ of prohibition should be made absolute. The "dangerous instrument" relied upon consists of tape and cloth. The state argues that an instrument which produces death may be found to be dangerous if it is used in such a way as to cause death or serious injury. This, however, requires a showing of a purpose of so using the instrument. The jury in the initial trial declined to find that the defendant acted with the purpose of causing death or serious injury when it acquitted him of the charge of murder in the second degree. By the verdict of guilty of involuntary manslaughter it found only that he had acted "recklessly" in using the tape and the gag. I do not believe that the armed criminal action statute was intended to cover a situation of the kind shown by this record.

The prosecutor argues that no particular state of mind is required under § 571.015, citing *State v. Miller*, 657 S.W.2d 259 (Mo. App. 1983), and *State v. Helm*, 624 S.W.2d 513 (Mo. App. 1981). It is suggested that it only need be shown that the defendant acted recklessly. *Miller* involved a firearm and *Helm* a machete. Whatever the case might be as to these weapons, which could be said to be inherently dangerous, the instrument charged in the information is dangerous only if used with the purpose of causing death or bodily harm. The first jury has foreclosed a finding of any such purpose.

By the state's argument a defendant convicted of involuntary manslaughter through reckless operation of an automobile could be separately tried for armed criminal action for the same killing. I do not believe that the legislature had this kind of a situation in mind when it passed the armed criminal action statutes.

It is unusual to terminate a criminal prosecution by writ of prohibition, but I am convinced that the underlying prosecution lacks sound legal basis. I therefore join in making the preliminary rule absolute.

Charles B. Blackmar, Judge

SUPREME COURT OF MISSOURI

en banc

No. 71012

STATE ex rel. DENNIS BULLOCH,
Relator,

vs.

HONORABLE A. J. SEIER, Judge of the Circuit Court
of Cape Girardeau County, Missouri,
- Respondent.

CONCURRING OPINION

(Duplicate of filing on May 16, 1989)

I agree with the principal opinion in its concession that *Missouri v. Hunter*, 103 S.Ct. 673 (1983), "does not control" this case. The *Hunter* discussion is thus extraneous, and I look to that part of the opinion that cites and applies *Illinois v. Vitale*, 100 S.Ct. 2260 (1980), and *Brown v. Ohio*, 97 S.Ct. 2221 (1977), to support its judgment.

I agree that *Vitale* and *Brown* are dispositive of the limited issue in this case; and for that reason, I concur.

ANDREW JACKSON HIGGINS,
Judge

APPENDIX B

SUPREME COURT OF MISSOURI

en banc

No. 71012

State ex rel. DENNIS BULLOCH,
Relator,

vs.

HONORABLE A.J. SEIER, Judge of the Circuit Court
of Cape Girardeau County, Missouri,
Respondent.

PROCEEDING IN PROHIBITION

(Duplicate of Filing on May 16, 1989)

Relator instituted this proceeding to prohibit respondent from allowing the state to prosecute relator for armed criminal action in connection with the death of his wife, Julia Bulloch. The Court of appeals, issuing the requested writ, concluded prosecution for armed criminal action violated relator's protection under the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States. We granted transfer and now make the preliminary rule absolute.

On May 6, 1986, relator's wife was asphyxiated when two strips of cloth were placed in her mouth and retained by tape wrapped around her face and over her mouth. The victim died at the family home, in which a fire occurred almost immediately following her death. Indicted on a charge of first degree murder in August, 1986 and, a month later, on a charge of second degree arson, relator was first tried for murder and the state elected to seek the death penalty. At trial, relator contended his wife's death was an accident resulting from an episode of con-

sensual sexual bondage, but admitted starting the fire. The jury found relator not guilty of first or second degree murder and returned a verdict of guilty on the lesser offense of involuntary manslaughter. Relator was sentenced to a term of seven years' imprisonment.

Following the homicide trial, relator was indicted on additional charges of armed criminal action and tampering with physical evidence. The armed criminal action indictment charged that relator recklessly caused the death of Julia Bulloch by asphyxiation and committed the felony of involuntary manslaughter "by, with, or through the use, assistance or aid of a dangerous instrument."¹ In response to a motion to dismiss that indictment, the state contended the tape and gag constituted a "dangerous instrument." Respondent overruled relator's motion to dismiss, which was based upon claims of double jeopardy, collateral estoppel, absence of legislative intent, and denial of due process in the form of prosecutorial vindictiveness. The Court of Appeals, Eastern District, concluded the question of prosecutorial vindictiveness involved disputed facts and was a matter for the trial court's discretion to be considered, if necessary, on direct appeal; however, the court found that the armed criminal action proceeding constituted double jeopardy and issued its writ of prohibition. During pendency of the proceedings in prohibition, relator was tried and convicted of arson and the tampering with physical evidence charge which had been added after the homicide trial, and he was sentenced to six and five years' imprisonment, respectively.

¹ The state does not contend that additional facts necessary to sustain the armed criminal action charge had not occurred or were not discovered despite the exercise of due diligence at the time of the murder trial. Indeed, it appears that the state was fully aware of the facts alleged in the armed criminal action indictment when it proceeded to prosecute relator for first degree murder.

The circumstances here present questions under the Double Jeopardy Clause, which has been said to protect against a second prosecution for the same offense after acquittal or conviction and preclude imposition of multiple punishments for the same offense. *Brown v. Ohio*, 97 S. Ct. 2221, 2225 (1977).² The concept of what constitutes the "same offense" in the context of double jeopardy was discussed in *Blockburger v. United States*, 52 S. Ct. 180 (1932), wherein it was stated: "The test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of a fact which the other does not.*" *Id.* at 182. Recent United States Supreme Court jurisprudence, however, has limited application of the *Blockburger* test in cases involving a single trial. See, e.g., *Missouri v. Hunter*, 103 S. Ct. 673 (1983); *Albernaz v. United States*, 101 S. Ct. 1137 (1981); *Whalen v. United States*, 100 S. Ct. 1432 (1980). In *Missouri v. Hunter*, it was noted: "the *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. *Id.* at 679 (quoting *Albernaz*, 101 S. Ct. 1137, 1143 (1981) (emphasis in original)). In *Hunter* the United States Supreme Court rejected this Court's erroneous notion that prosecution of a defendant for both first degree robbery and armed criminal action was violative of the Double Jeopardy Clause. The Court held "the question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. . . ." 103 S. Ct. at 679. Because the Missouri Legislature clearly intended cumulative punishment under the armed criminal action statute, the Court found defendant was not subjected to double jeopardy.

² The double jeopardy clause of the Missouri Constitution, art. I, § 19, has been construed to apply "only where there has been an acquittal of the defendant by a jury." *Murray v. State*, 475 S.W.2d 67, 70 (Mo. 1972).

The core issue of double jeopardy for convictions of robbery in the first degree as well as armed criminal action was decided by this Court in 1977 in *State v. Treadway*, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied*, 439 U.S. 838, 99 S. Ct. 124, 58 L.Ed.2d 135 (1978). In that case, we properly took the position that multiple convictions for both armed criminal action and the underlying felony were not violative of the Double Jeopardy Clause of the United States Constitution. Two years later, the Court took the same position in *State v. Valentine*, 584 S.W.2d 92 (Mo. banc 1979), but six months thereafter on January 15, 1980, this Court handed down the first of its aberrant decisions in *Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980) [*Sours I*], in which it vacated a conviction of armed criminal action that had been entered with a robbery first degree conviction.³ The United States Supreme Court vacated and remanded *Sours I* for reconsideration in light of *Whalen v. United States*, 100 S. Ct. 1432 (1980), which gave adequate guidance for this Court to uphold the armed criminal action conviction in *Sours*. Nevertheless, this Court in *Sours v. State*, 603 S.W.2d 592 (Mo. banc 1980) [*Sours II*] intransigently refused to follow the teachings of *Whalen* and vacated *Sours*'s armed criminal action conviction once more. Certiorari was again sought in the United States Supreme Court, but prior to a hearing there *Sours* was released from confinement and certiorari was denied. Noteworthy is the fact that Justice Blackmun and Justice Rehnquist, advised of *Sours*'s release, would have dismissed the petition as moot. *Missouri v. Sours*, 101 S. Ct. 953 (1981). In March of 1981, in *Albernaz v. United States*, 101 S. Ct. 1137 (1981), the Supreme Court forcefully reiterated its position, squarely contrary to that of this Court in *Sours I* and *Sours II*. At that point, the United States Supreme Court, acutely aware of the problems flowing from *Sours I* and *II*, noted that the various districts of the

³ In neither *Sours I* nor its progeny did this Court make clear how half of a judgment (i.e. armed criminal action) was invalid but the other half (robbery) was perfectly valid.

Missouri Courts of Appeals, assuming they were bound by this Court's *Sours* decisions, had in a growing number of cases felt required to reverse armed criminal action convictions. Between March 23 and June 22, 1981, the United States Supreme Court vacated judgments of reversal in sixteen such cases and in each instance remanded the cause for further consideration in light of *Albernaz*. In addition, at the time of this Court's decision in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), where this Court obdurately refused to follow *Albernaz*, the Supreme Court accepted review of three of our cases including State v. Williams, 606 S.W.2d 777 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. Greer, 605 S.W.2d 93 (Mo. 1980). See Missouri v. Greer, 101 S. Ct. 3000 (1981). In *Albernaz*, the Court affirmed the opinion of the United States Court of Appeals for the Fifth Circuit upholding petitioner's conviction and sentences and denying his claim of double jeopardy. The Court, by way of introduction to its incisive, pellucid opinion, noted that:

We granted certiorari to consider whether Congress intended consecutive sentences be imposed for the violation of these two conspiracy statutes and, if so, whether such cumulative punishment violates the Double Jeopardy Clause of the United States Constitution.

101 S. Ct. at 1140. By its decision the Court, in its concluding paragraphs, removed any question as to its views on the matter, stating:

Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.

101 S. Ct. at 1145.

Immediately after this pronouncement, the Court commenced a succession of orders to Missouri's appellate courts vacating judgments which had reversed armed criminal action convictions when accompanied with convictions of other crimes and mandating further consideration in the light of *Albernaz*.

Notwithstanding these directions from the United States Supreme Court, this Court refused to honor the "rule of supremacy" and would not accept the Court's interpretation of the organic law embodied in the Constitution of the United States. By refusing so to do, the majority sought to burden the Missouri Legislature with its view of so-called federal constitutional restraints contrary to those enunciated by the United States Supreme Court under the federal Constitution. In *Oregon v. Hass*, 95 S. Ct. 1215, 1219 (1975), the Court wrote "a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original.) The Oregon Court's restrictive misinterpretation of the 14th Amendment in that case was cast aside as error. Despite these developments, detailed in the dissent of this writer in *State v. Haggard*, 619 S.W.2d 44, 51-57 (Mo. banc 1981) (responding to the opinion of Welliver, J., on the motion for rehearing), it was pointed out this Court refused to abide directives of the Supreme Court of the United States and was willing to burden our legislature with federal constitutional notions contrary to the Court's mandate. As related in that dissent, "Neither the Oregon court in *Hass* nor the North Carolina court in *North Carolina v. Butler*, [99 S. Ct. 1755 (1979)] were permitted to journey such an imperious path of nonconformance." 619 S.W.2d at 57.

But that was merely the tip of the iceberg. Immediately upon the heels of *Haggard*, the same mistaken notion was pressed upon the following cases in quick order by this Court and led to wholesale reversal of armed criminal action convictions in: *State v. Fletcher*, 619 S.W.2d 57 (Mo. banc 1981); *State v. Greer*, 619 S.W.2d 62 (Mo. banc 1981); *State v. Williams*, 619 S.W.2d 63

(Mo. banc 1981); State v. Hawkins, 619 S.W.2d 64 (Mo. banc 1981); State v. Greer, 619 S.W.2d 65 (Mo. banc 1981); State v. Collins, 619 S.W.2d 66 (Mo. banc 1981); Brown v. State, 619 S.W.2d 68 (Mo. banc 1981); State v. Helton, 619 S.W.2d 69 (Mo. banc 1981); State v. McGee, 619 S.W.2d 70 (Mo. banc 1981); State v. Tunstall, 619 S.W.2d 71 (Mo. banc 1981); State v. Counselman, 619 S.W.2d 72 (Mo. banc 1981); State v. Sinclair, 619 S.W.2d 73 (Mo. banc 1981); State v. Payne, 619 S.W.2d 75 (Mo. banc 1981); State v. Crews, 619 S.W.2d 76 (Mo. banc 1981); State v. Lowery, 619 S.W.2d 77 (Mo. banc 1981); State v. Crews, 619 S.W.2d 78 (Mo. banc 1981); State v. White, 619 S.W.2d 79 (Mo. banc 1981); State v. Martin, 619 S.W.2d 80 (Mo. banc 1981); and State v. Williams, 619 S.W.2d 82 (Mo. banc 1981). During this period and in the weeks that followed until *Hunter* was specifically directed to the Missouri courts, enumerable writs of habeas corpus and direct orders were mistakenly issued by this Court vacating an array of felony convictions, producing a chaotic situation in Missouri.

On November 10, 1981, this Court denied review of the decision of the Western District of the Court of Appeals in State v. Hunter, 622 S.W.2d 374 (Mo. App. 1981), which had vacated the defendant's armed criminal action conviction on double jeopardy grounds, leaving only his robbery conviction. Reaching directly to the Court of Appeals by writ of certiorari, the Court vacated the decision of the Missouri Court of Appeals and remanded with the ringing mandate for reinstatement of the armed criminal action conviction. In that opinion, delivered by Chief Justice Burger, the Supreme Court reviewed the strange history of this Court's failure to follow *Whalen* and *Albernaz* and pointed out that the decisions in *Sours I*, *Sours II*, and *Haggard* expressed a view which "manifests a misreading of our cases on the meaning of the double jeopardy clause of the Fifth Amendment." 103 S. Ct. at 677. The Court, brushing aside the *Blockburger* argument, pointed out that:

[h]ere, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Where as here, a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes prescribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishments under such a statute in a single trial.

Id. at 679 (footnote omitted).

Hunter, of course, involved a single trial. Had the charges in the case at bar been tried in one proceeding, there could be no question relator's claim of double jeopardy would fail. However, because the charge of armed criminal action was not tried with the underlying felony, the Double Jeopardy Clause prohibition against successive prosecution must be considered and we must determine whether *Hunter* controls this case. Our task in this regard is somewhat complicated by § 565.004, RSMo 1986, pertaining to joinder of offenses in a trial for first degree murder.⁴ As evident from the plain language of the statute, circumstances allowing joinder of offenses with first degree

⁴ Section 565.004, RSMo, provides in pertinent part:

1. Each homicide offense which is lawfully joined in the same indictment or information together with any homicide offense or offense other than a homicide shall be charged together with such offense in separate counts. A count charging *any* offense of homicide *may only* be charged and tried together with one or more counts of *any other homicide or offense other than homicide when all* such offenses arise out of the same transaction *or constitute part of a common scheme or plan*. Except as provided in subsections 2, 3, and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree. . . .

murder are limited; but where, as here, the charges arose from the same transaction and relate to acts committed against the same victim, the murder and armed criminal action counts could have been joined and tried together. § 565.004.2, RSMo 1986.

Fully aware that in all likelihood relator would not have wanted the armed criminal action charge tried with the first degree murder offense had the indictments been returned contemporaneously, we must nonetheless conclude that relator's protection against successive prosecution for the same offense would be violated if the current prosecution for armed criminal action were allowed. Section 571.015, RSMo 1986, defines armed criminal action thusly:

1. [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is *also* guilty of the crime of armed criminal action. . . .

Armed criminal action, by definition, incorporates all the elements of the underlying felony. Here the armed criminal action indictment contains an allegation relator committed the felony of involuntary manslaughter, and it cannot be said that in this instance proof of involuntary manslaughter requires proof of an additional fact which the armed criminal action charge

-
2. A count charging *any* offense of *homicide of a particular individual* *may be* jointed in an indictment or information and tried with one or more counts charging *any other homicide or offense other than a homicide* committed *against that individual*.

-
4. *When the state waives the death penalty* for a murder first degree offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

(Emphasis added.)

does not. The state unquestionably relies on and will attempt to prove the elements of involuntary manslaughter in establishing relator's commission of armed criminal action. The two offenses are therefore the same for purposes of relator's claim of successive prosecution, and unless the teachings of *Hunter* can be said to reach cases of successive prosecution, we must abide the earlier decisions of the United States Supreme Court in *Illinois v. Vitale*, 100 S. Ct. 2260, 2267 (1980); and *Brown v. Ohio*, 97 S. Ct. 2221, 2226-7 (1977). Although we embrace the philosophy reflected in *Hunter*, the Court's strong emphasis on the fact that case involved a single proceeding leads us to reluctantly conclude *Hunter* does not control in this instance, where there is an attempt at successive prosecution.

For the reasons stated in this opinion, the rule in prohibition is made absolute. Having so held, we need not reach the other questions raised by the parties.

ALBERT L. RENDLEN, JUDGE

Billings, C.J., concurs; Robertson
and Covington, JJ., concur in result;
Blackmar, J., concurs in result in
separate opinion filed; Welliver, J.,
concurs in result and concurs in
concurring in result opinion of
Blackmar, J.; Higgins, J., concurs
in separate opinion filed.

SUPREME COURT OF MISSOURI

en banc

No. 71012

**STATE ex rel. DENNIS BULLOCH,
Relator,**

vs.

**HONORABLE A. J. SEIER, Ju^rge of the Circuit Court
of Cape Girardeau County, Missouri,
Respondent.**

OPINION CONCURRING IN RESULT

(Duplicate of Filing on May 16, 1989)

I.

The rambling narration of the history of the construction of § 571.015, RSMo 1986, is quite beside the point. The discussion should start, rather than ending, with *Missouri v. Hunter*, 459 U.S. 359 (1983), which held that, in a single trial, cumulative punishments could be assessed for a felony (such as armed robbery) and for armed criminal action for the use of a dangerous instrument or deadly weapon in the perpetration of that felony. By this analysis, the underlying felony is in effect a lesser offense included within the charge of armed criminal action. I rather agree that *Illinois v. Vitale*, 447 U.S. 410 (1980) and *Brown v. Ohio*, 431 U.S. 161 (1977) preclude the separate trial of the greater offense, after the lesser has been separately tried, regardless of the result of the initial trial.

I accept the statement in the principal opinion that § 565.004.2, RSMo 1986, authorizes the trial of a homicide offense, including murder in the first degree, with a nonhomicide offense such as armed criminal action. In any event the charges could have been brought in the same indictment or information,

Rule 23.05, and tried jointly pursuant to Rule 24.07. Inasmuch as the counts could have been tried together, the state should not now be allowed to try the armed criminal action separately.

For another reason I believe that the writ of prohibition should be made absolute. The "dangerous instrument" relied upon consists of tape and cloth. The state argues that an instrument which produces death may be found to be dangerous if it is used in such a way as to cause death or serious injury. This, however, requires a showing of a purpose of so using the instrument. The jury in the initial trial declined to find that the defendant acted with the purpose of causing death or serious injury when it acquitted him of the charge of murder in the second degree. By the verdict of guilty of involuntary manslaughter it found only that he had acted "recklessly" in using the tape and the gag. I do not believe that the armed criminal action statute was intended to cover a situation of the kind shown by this record.

The prosecutor argues that no particular state of mind is required under § 571.015, citing *State v. Miller*, 657 S.W.2d 259 (Mo. App. 1983), and *State v. Helm*, 624 S.W.2d 513 (Mo. App. 1981). It is suggested that it only need be shown that the defendant acted recklessly. *Miller* involved a firearm and *Helm* a machete. Whatever the case might be as to these weapons, which could be said to be inherently dangerous, the instrument charged in the information is dangerous only if used with the purpose of causing death or bodily harm. The first jury has foreclosed a finding of any such purpose.

By the state's argument a defendant convicted of involuntary manslaughter through reckless operation of an automobile could be separately tried for armed criminal action for the same killing. I do not believe that the legislature had this kind of a situation in mind when it passed the armed criminal action statutes.

It is unusual to terminate a criminal prosecution by writ of prohibition, but I am convinced that the underlying prosecution lacks sound legal basis. I therefore join in making the preliminary rule absolute.

Charles B. Blackmar, Judge

SUPREME COURT OF MISSOURI

en banc

No. 71012

STATE ex rel. DENNIS BULLOCH,
Relator,

vs.

HONORABLE A. J. SEIER, Judge of the Circuit Court
of Cape Girardeau County, Missouri,
Respondent. —

CONCURRING OPINION

(Duplicate of filing on May 16, 1989)

I agree with the principal opinion in its concession that *Missouri v. Hunter*, 103 S.Ct. 673 (1983), "does not control" this case. The *Hunter* discussion is thus extraneous, and I look to that part of the opinion that cites and applies *Illinois v. Vitale*, 100 S.Ct. 2260 (1980), and *Brown v. Ohio*, 97 S.Ct. 2221 (1977), to support its judgment.

I agree that *Vitale* and *Brown* are dispositive of the limited issue in this case; and for that reason, I concur.

ANDREW JACKSON HIGGINS,
Judge

APPENDIX C

**IN THE SUPREME COURT
OF MISSOURI**

No. 71012

STATE EX REL. DENNIS BULLOCH,

Relator,

v.

**HONORABLE A.J. SEIER, JUDGE
CIRCUIT COURT, CAPE GIRARDEAU COUNTY
Respondent.**

MOTION FOR REHEARING

(Duplicate of Filing on May 31, 1989)

Comes now the Respondent by and through the undersigned Assistant Prosecuting Attorney and moves this Court pursuant to Supreme Court Rule 84.17 to grant him a rehearing. This Honorable Court overlooked or misinterpreted matters of law or fact in the above-entitled cause. The rehearing should be granted on the following grounds:

In its opinion of May 16, 1989, this Court correctly concluded, albeit reluctantly, that the tenents of *Missouri v. Hunter*, 103 S.Ct. 673 (1983) do not control the issue presented in this case. Without question *Hunter* allows for the prosecution of a defendant for armed criminal action and the underlying felony while not being violative of the Doubel Jeopardy clause. As this Court points out, because the legislature intended cumulative punishment under the armed criminal action statute, an exception to the Double Jeopardy rights of defendant has been created.

This Court misinterpreted *Hunter* in searching for precedent to reach cases of successive prosecution. *Hunter* only teaches us

that an exception to the prohibition of double jeopardy exists where the intent of the legislature is paramount.

Since *Hunter* does not control because it involved a single prosecution, the issue of successive prosecution must be addressed on its own while incorporating recognized exceptions and the trend of courts, *per Hunter*, to follow the intent of the legislature.

The Court correctly states in its opinion at page 10 that had the charges at bar been tried in one proceeding, a claim of double jeopardy would fail. The issue before this Court is whether the charges could have been joined and tried in a single proceeding. If joinder of the counts were permissible successive prosecution would be highly suspect.

Joinder of offenses with a murder first charge is specifically limited to those situations delineated in Section 565.004 R.S.Mo. 1986. Section 565.004.1 allows for joinder of offenses when all such offenses arise out of the same transaction or constitute part of a common scheme or plan. Joinder pursuant to subsection one is limited to only those exceptions set forth in subsection 2, 3 and 4.

This Court misinterpreted the law or inadvertently overlooked a material matter of law when it stated the armed criminal action could have been joined and tried together with the murder charge pursuant to Section 565.004.2. As quoted in the opinion in footnote 4 on page 10 the subsection omits the word, "*ALTERNATIVELY*". The counts may only be joined when charged "*ALTERNATIVELY*".

As this Court points out, the offenses of murder first and armed criminal action are the same for purposes of double jeopardy, it is impossible to charge the same offense in the *ALTERNATIVE*.

As this Court correctly points out, joinder of offenses is allowed only when the provisions of paragraph 2 concerning

charging in the alternative, paragraph 3, when the defendant is a prior offender or paragraph 4, when the State waives the death penalty.

In the case at bar the State could not charge in the alternative, Relator was not a prior offender and the State did not waive the death penalty. When this Court relied on the misquoted subsection it completely ignored the mandate of subsection 4. The State did not waive the death penalty so the counts could not have been joined in a single proceeding. The State has been placed in an untenable position when this Court opines that the State should ignore the statute.

When this Court views the statute with the inclusion of the word "*ALTERNATIVELY*", this Court will conclude that the State was prohibited from trying the two counts in one trial.

Having established that *Missouri v. Hunter* does not control and that the statute unquestionably would not permit joinder, the prohibition of successive prosecution must be considered.

Successive prosecution must be permitted for as in *Hunter* when the legislative intent controlled. Here, the legislative intent of joinder pursuant to Section 565.004 should control.

The State of Missouri has an inherent interest in the prosecution of the armed criminal action count. This strong interest overrides the prohibition of succession prosecution when viewed in conjunction with the joinder statute and the recognized exceptions to the prohibition against successive prosecution.

Reliance upon *Brown v. Ohio* 97 S.Ct. 2221 (1977) and *Illinois v. Vitale* 100 S.Ct. 2260 (1980) is misplaced for the reason that they do not recognize exceptions. These cases concern subsequent prosecution for the greater offense when the defendant was convicted of the lesser included offense. *Vitale* was in fact remanded for a determination by the State Court as to the issue of the relationship of the two offenses. These two cases seek the determination of the intent of the legislature in their findings.

A specific exception to the prohibition of successive prosecution was created by the enactment of Section 565.004.

The prohibition established in *Brown* does have some exceptions as pointed out in *Jeffers v. United States*, 97 S.Ct. 2207 (1977). In *Jeffers* the defendant was solely responsible for the successive prosecutions. Further the Court noted in footnote 20 that the propriety of a second trial would have been treated differently if the Government had by its action contributed to the separate prosecution. As this Court is well aware the State was only following the dictates of the statute. This Court must realize that the State is stuck with the statute the legislation has enacted. If the counts had been joined this court concludes on page 11 of the opinion that in all likelihood Relator would not have wanted the armed criminal action tried with the first degree murder and the statute would have supported his objection.

The prohibition against successive prosecution was further narrowed in *Ohio v. Johnson*, 104 S.Ct. 2536 (1984). The Supreme Court held that continued prosecution on the greater offense when the defendant plead guilty to the lesser offense in a multi-count indictment did not violate double jeopardy.

The strong interest of the State of Missouri in pursuing this charge must be recognized and protected. The untenable position that the State of Missouri has been placed in solely because they follow the mandate of the statute must be addressed. Exceptions to the prohibition of successive prosecution which exist must be viewed in light of the obvious intent of the legislature in passing Section 565.004 and the provisions of *Missouri v. Hunter*.

Wherefore the State of Missouri requests this Honorable Court grant his request for a rehearing in light of the misinterpreted matter of law and fact.

Respectfully submitted,

/s/ Thomas J. Mehan
Assistant Prosecuting Attorney
Attorney for Respondent
7900 Carondelet
Clayton, MO 63105

STATE OF MISSOURI)
)
) SS.
COUNTY OF ST. LOUIS)

CERTIFICATION OF SERVICE

The undersigned hereby certifies that two copies of the above and foregoing were mailed, postage prepaid, this 31st day of May, 1989, to: Mr. Arthur Margulis, Attorney at Law, 168 N. Meramec Suite 110, Clayton, Missouri 63105 and one copy of the above and foregoing was mailed, postage paid, this 31st day of May, 1989, to: Honorable A. J. Seier, Judge, 32nd Judicial Circuit Cape Girardeau County Courthouse, Cape Girardeau, Missouri 63701.

THOMAS J. MEHAN

SUBSCRIBED and SWORN to before me, a Notary Public,
this 31st day of May, 1989.

NOTARY PUBLIC

My commission expires:

APPENDIX D

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
-Clerk

Telephone
(314) 751-4144

June 13, 1989

Thomas J. Mehan
Ass't Prosecuting Attorney
7900 Carondelet
Clayton, MO 63105

In re: State ex rel. Dennis Bulloch vs. Honorable A. J.
Seier, Judge, Circuit Court, Cape Girardeau
County., No. 71012

Dear Counsel:

This is to advise that the Court this day entered the following order in the above entitled cause:

“Respondent’s motion for rehearing overruled.”

Opinion modified on Court’s own motion.

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: Arthur Margulis

APPENDIX E

**STATE OF MISSOURI - IN THE CIRCUIT COURT
OF ST. LOUIS COUNTY**

State of Missouri

-vs-

Dennis Neal Bulloch Race White D.O.B. 10-29-53 P.D. Ballwin P.D.
2008 Judy Sex Male Aliases Report No. 86-2914
Arnold, MO. 63010 Age 33
 Ht. 5'11"
Defendant Wt. 175

Charge: Count I: Armed Criminal Action - Felony
 Count 2: Tampering With Physical Evidence - Class
 D Felony

Complainant:

Date Warrant Issued: June 26, 1987 P12:17

Witnesses:

Lt. Dennis Niere
Ballwin P.D.
300 City Hall Dr.
Ballwin, MO. 63011

INDICTMENT

State of Missouri)
 -) SS
County of St. Louis)

Count I: The Grand Jurors of the County of St. Louis, State of Missouri, charges that the defendant in violation of Section 571.015, RSMo, acting alone and/or with another, committed the felony of armed criminal action, punishable upon conviction under Section 571.015.1, RSMo in that on or about Tuesday, May 6, 1986, at approximately 5:10 a.m. at 251 White

Tree, City of Ballwin, in the County of St. Louis, State of Missouri, the defendant committed the class C felony of involuntary manslaughter, in that defendant recklessly caused the death of Julia A. Bulloch by asphyxiating her, and the defendant committed the foregoing felony of involuntary manslaughter by, with and through the use, assistance and aid of a dangerous instrument;

A TRUE BILL

NO TRUE BILL

/s/ (illegible) _____ /s/ (illegible)

May Term, 1987 As a condition of release, bond is set at _____.

/s/ (illegible)

Circuit Judge, St. Louis County

ORIGINAL INDICTMENT

**STATE OF MISSOURI - IN THE CIRCUIT COURT
OF ST. LOUIS COUNTY**

State of Missouri

-VS-

Warrant # W55671

Dennis Neal Bulloch Race White D.O.B. 10-29-53 P.D. Ballwin
2008 Judy Sex Male Aliases Report No. 86-2914
Arnold, MO. 63010 Age 33
 Ht. 5'11"
Defendant Wt. 175

Charge: Count 01: Armed Criminal Action - Felony
Count 02: Tampering With Physical Evidence - Class D Felony

Complainant: Lt. Dennis Niere

Date Warrant Issued: 06/18/87

Witnesses:

Lt.Det. Dennis Niere GJ
c/o Ballwin P.D.
300 City Hall Dr.
Ballwin, MO 63011
0020134 (314) 227-9636

INDICTMENT

State of Missouri)
) SS

County of St. Louis)

Count 02

The Grand Jurors of the County of St. Louis, State of Missouri, charges that the defendant in violation of Section 575.100 R.S.Mo., committed the Class D Felony of tampering

with physical evidence, punishable upon conviction under sections 558.011.1(4) and 560.011 R.S.Mo., in that, on or about Tuesday, May 6, 1986, at approximately 5:10 a.m., at 251 White Tree, in the City of Ballwin, in the County of St. Louis, State of Missouri, the Defendant destroyed tape, tape spools, and the diary of Julia A. Bulloch with purpose to impair its availability in the trial of Dennis Neal Bulloch for murder in the first degree, an official proceeding, and thereby impaired and obstructed the prosecution of Dennis Neal Bulloch for the crime of murder in the first degree;

A TRUE BILL

NO TRUE BILL

/s/ (illegible)

/s/ (illegible)

May Term, 1987 As a condition of release, bond is set at \$150,000.00.

/s/ (illegible)

Circuit Judge, St. Louis County

APPENDIX F

MISSOURI COURT OF APPEALS EASTERN DISTRICT DIVISION THREE

No. 54859

State ex rel. DENNIS BULLOCH,
Relator,

vs.

HONORABLE A.J. SEIER, Judge of the Circuit Court
of Cape Girardeau County, Missouri,
Respondent.

WRIT OF PROHIBITION

(Opinion filed: August 9, 1988)

We issued a provisional writ of prohibition on respondent circuit judge to examine two questions of law relating to a threatened prosecution by the State of Missouri against Dennis Bulloch for armed criminal action. These questions are: (1) is the prosecution barred as a violation of the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, or, in the alternative, is it barred by the application of the doctrine of collateral estoppel; and, (2) is the prosecution, on the facts, beyond the meaning and intent of the legislature in passing the armed criminal action statute, Section 571.015 RSMo 1978 [effective January 1, 1979]. By this opinion we order the preliminary writ made permanent.

On May 6, 1986 relator's wife, Julia Bulloch, was asphyxiated by two strips of cloth placed in her mouth and retained by tape over the mouth and around her face. Subsequently a fire occurred at the scene involving the family home. In September, 1986,

the Grand Jury of St. Louis County indicted relator on the charge of murder first degree and arson second degree. Relator was tried only on the murder charge. The state elected to seek a death sentence. The defense was an accident as a result of a consensual sexual bondage episode. The jury found relator not guilty on the charge of murder first degree and murder second degree. It returned a verdict of guilty on the included offense of involuntary manslaughter. The sentence in accord with the verdict was not appealed.

After the murder trial, the Grand Jury of St. Louis County indicted defendant on the charge of armed criminal action under Section 571.015 RSMo 1978. The indictment alleged that relator recklessly caused the death of Julia Bulloch by asphyxiation and committed the felony of involuntary manslaughter "by, with, or through the use, assistance, or aid of a dangerous instrument." The "instrument" consists of two pieces of cloth [each 2" by 3"] and the tape. Respondent Circuit Judge overruled relator's motions to dismiss the armed criminal action charge. The motion was founded upon claims of double jeopardy, collateral estoppel [on the issue of intent], absence of legislative intent, and, denial of due process in the form of prosecutorial vindictiveness. We concluded that the latter ground was based upon disputed facts which, if necessary, was a matter for direct appeal. This proceeding does not involve the allegation of prosecutorial vindictiveness.

The prosecution of the murder first degree case was complicated by the provisions of Sections 565.004.1 and 565.004.4, Laws 1983 effective October 1, 1984. Section 565.004.4 prohibited the state from trying relator for murder in the first degree together with an armed criminal action charge unless it waived the death penalty on the murder charge. Section 565.004.1 RSMo 1986 [effective October 1, 1984] contains a provision that no murder in the first degree offense may be tried together with any offense other than murder in the first degree.

Section 571.015.1 RSMo 1978 provides that armed criminal action may occur when "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon...." However, the limitations in Section 565.004.1 and .4 create a conflict between a defendant's constitutional protection against double prosecution and the state's interest in prosecuting crimes where weapons or dangerous instruments are employed, if the state seeks the death penalty. On the one hand, these provisions require the state to prosecute the murder in a separate trial from the armed criminal action charge. On the other hand, defendant claims a federal constitutional right to be free from more than one trial on a single offense. Defense relies on *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983) and *State v. Cooper*, 712 S.W.2d 27, 31 (Mo. App. 1986).

In *Missouri v. Hunter*, the United States Supreme Court held that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes prescribed the same conduct under the *Blockburger* test, [*Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932)] a court's task of statutory construction is at an end and the prosecutor may seek, and the trial court or jury may impose cumulative punishment under such statutes *in a single trial*. In that case the defendant did not contend that his right to be free from multiple trials for the same offense had been violated. The issue was whether the Missouri Supreme Court properly construed the state's statute on armed criminal action as a violation of constitutional rights prohibiting multiple punishments for the same offense.

There was no dispute that the armed criminal action statute is a vehicle to punish the same acts as the felony committed by the use of a weapon or dangerous instrument. The requirement of a single trial on both related charges was repeatedly assumed and noted by the *Hunter* court. This court has noted the require-

ment of a single trial. *State v. Cooper*, 712 S.W.2d 27, 31 (Mo. App. 1986). The fact that provisions of Sections 565.004.1 and .4 prohibited a joint trial permits the conclusion that relator could have been tried, at the option of the state, on the charge of murder first degree and armed criminal action in a single trial only if the state waived the death penalty. It does not, as the state argues, require the conclusion that these statutory provisions satisfy the constitutional mandate against multiple trials for the same offense. These sections do not purport to create an exception to the single-trial double jeopardy rights of relator. Indeed, they could not do so. These sections offer the prosecutor a choice. The prosecutor chose to seek the death penalty in a trial of only the murder charge.

We conclude that once the state determined to try the murder first degree charge, and requested the death penalty, a subsequent or separate prosecution of the armed criminal action charge was prohibited by the provisions of the Double Jeopardy Clause of the Fifth Amendment. This is true, as a matter of constitutional law, whether the original grand jury had indicted relator for armed criminal action or where the charge was brought by a grand jury after the trial on the charge of murder in the first degree. There is some logic to the isolation of the murder first degree trial from the related armed criminal action charge where the death sentence is at issue. The charge is the ultimate crime and in such cases the matter of further punishment may be meaningless.

We need not reach the collateral estoppel and legislative intent questions and elect not to decide them in this writ proceeding. A writ of prohibition is a proper remedy to preclude a subsequent prosecution when the defendant-relator raises the bar of double jeopardy. *State ex rel. Lang v. Hodge*, 608 S.W.2d 432, 435 (Mo. App. 1980), citing *Weaver v. Schaaf*, 520 S.W.2d 58, 67-68 (Mo. banc 1975). The doctrine of double jeopardy applies where the two offenses are the "same offense." *State ex rel. Lang v. Hodge*, 608 S.W.2d 432, 435

(Mo. App. 1981). It has been decided that armed criminal action is the "same offense" as the associated felony. *Missouri v. Hunter*, 103 S.Ct. at 679; *Sours v. State*, 603 S.W.2d 592, 606 (Mo. banc 1980). By its nature the armed criminal action charge defines a crime to punish the same acts as the related felony. It must be tried with the associated felony or not at all. Our provisional writ is now made permanent.

/s/ Kent E. Karohl

— Kent E. Karohl, Presiding Judge

Gerald Smith, J., & John Kelly, Jr., J., concur.

